

September 5, 1996

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
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DECISION ON APPEAL OF SHORT SUBDIVISION

SUBJECT: Department of Development and Environmental Services File Nos. L95S0022 and L9600302

RICHARD LINDSTROM
Appeal of Short Subdivision

Location: Generally located on the west side of 244th Avenue Southeast, approximately 1/4 mile north of Southeast 192nd Street

Applicant/Appellant: Richard Lindstrom
22424 Southeast 187th
Maple Valley, WA 98038

Attorney: Patrick Anderson
Attorney at Law
P.O. Box 924
Snoqualmie, WA 98065

SUMMARY OF RECOMMENDATIONS:

Division's Preliminary:	Deny appeal
Division's Final:	Deny appeal
Examiner:	Grant in part; deny remainder

PRELIMINARY MATTERS:

Notice of appeal received by Examiner:	July 24, 1996
Statement of appeal received by Examiner:	July 24, 1996
Department Preliminary Report issued:	August 8, 1996

EXAMINER PROCEEDINGS:

Hearing Opened:	August 22, 1996
Hearing Closed:	August 22, 1996

Participants at the proceedings and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the Office of the King County Hearing Examiner.

ISSUES ADDRESSED:

- Sensitive Areas Code requirements - wetland and stream classifications

- Hearing Examiner jurisdiction - short plat appeals

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. On April 18, 1995, Richard Lindstrom filed an application for a short subdivision of 20.76 acres located in the RA-5 zone west of 244th Avenue Southeast and approximately 1/4 mile north of Southeast 192nd Street. The application seeks to divide the parcel into four residential 5-acre lots. On May 31, 1996, a letter of preliminary approval was issued for the short plat application by the King County Land Use Services Division. The conditions of approval were revised within a letter issued July 5, 1996. Mr. Lindstrom has filed a timely appeal of the second preliminary approval letter.
2. The statement of appeal filed on behalf of Mr. Lindstrom by attorney Patrick Anderson raises a number of issues which are beyond the jurisdiction of the Hearing Examiner to consider. Hearing Examiner jurisdiction to entertain appeals of short plat administrative approvals and denials is based on KCC 19.26.130. This provision assigns jurisdiction to hear appeals concerning certain types of technical issues to other County departments with specific subject matter expertise. Thus, sewage and water issues come under the appeal jurisdiction of the County Department of Public Health. Questions concerning the proper application of the King County Road Standards are assigned to the County Road Engineer. Drainage issues are directed to the Surface Water Management Division, and a decision based on the Uniform Fire Code is subject to review by the County Fire Prevention Advisory and Appeals Board. Remaining elements of the Land Use Services Division's decision on the preliminary short plat application regarding matters not specifically reviewable by other departments and agencies may be appealed by an aggrieved person to the Hearing Examiner.
3. Pursuant to the provisions of KCC 19.26.130 described above, the Appellant's challenges to Conditions 5.D of the preliminary approval (dealing with cul de sac dimensions) and to Condition No. 6 (requiring floodplain mapping for wetlands and enclosed depressions) do not fall within Hearing Examiner jurisdiction. Issues concerning Road Standard conditions and regarding the application of the Surface Water Design Manual must take the form of variance requests respectively to the County Road Engineer and the Surface Water Management Division. Accordingly, the Appellant's challenges to preliminary approval Conditions 5 and 6 are dismissed from the appeal without prejudice.
4. The Appellant's challenge to Condition 2.G must also be dismissed. The Appellant seeks a ruling that the requirement that all sensitive areas tracts on the property must be placed in the ownership of a homeowners' association or be conveyed by undivided interest to all lot owners is arbitrary and capricious, exceeds the County's police power, and constitutes an unconstitutional taking of private property. Without prejudging the merits of the Appellant's position, it is clear that the requirements stated within Condition No. 2.G of the preliminary approval mandating the form of ownership of onsite sensitive areas tracts merely recite the code requirements contained at KCC 21A.24.180.B. Therefore, the Appellant's challenge is essentially that this code section is unconstitutional on its face.

Consideration of such a challenge is beyond the jurisdiction of the King County Hearing Examiner's Office, which as an administrative tribunal possesses no inherent review authority beyond that specifically conferred upon it by ordinance or statute. No authority to pass judgment on the constitutionality of ordinances has been conferred upon the Hearing Examiner either by state law or any other County ordinance, nor can such power be inferred from any ordinance or statute as a necessary adjunct to specifically delegated powers.

5. Two issues raised by Mr. Anderson's appeal statement remain before us for review. These both relate to Condition 2 of the preliminary approval. One issue is whether Wetland Z on Lot 4 was properly designated by County staff as a Class 2 wetland requiring a 50-foot protective buffer. The second question is whether the water course on Lot 3 was correctly identified by staff as a stream requiring sensitive areas protection. With respect to the second issue, as argued by the Appellant, a finding that the water course is not a stream within the meaning of the Sensitive Areas Ordinance carries with it a further implication that no stream mitigation plan should be required. But, such finding may or may not be determinative of the floodplain delineation requirement under the Surface Water Drainage Design Manual. This is because imposition of

the floodplain delineation requirement may simply depend upon the existence of a water course without regard to whether it is also a natural feature deserving of SAO protection.

6. Four wetlands have been identified on Lot 4 of the Lindstrom short plat. Three of these are very small and fall below the County's threshold of regulatory concern. The fourth is identified as Wetland Z, comprises 27,150 square feet onsite and extends south onto an adjacent parcel. Although the offsite portion has not been delineated, the Applicant's wetland consultant estimates that the total areal extent of Wetland Z is less than one acre.
7. A wetlands evaluation and delineation report was issued for the Lindstrom site by Watershed Dynamics, Inc. on December 1, 1995. The wetland report describes Wetland Z as having a forested component with a non-forested edge. The report's technical determination was that "Wetland Z would be defined, using criteria outlined in the Classification of Wetlands and Deep Water Habitats of the United States (Cowardin et al. FWS/OBS-79/31), as a Palustrine, forested, broadleaved deciduous, seasonally flooded/saturated (PF01E) with a Palustrine, emergent, persistent, seasonally flooded/saturated (PEM1E) fringe." Wetland Z is similar in composition to the other three small wetlands found on the Lot 4 parcel.
8. The report also notes that the entire Lindstrom short plat property consists generally of a forested habitat, stating that the "primary plant community found throughout the majority of the subject property was comprised of a mixed conifer/deciduous forest community with a tree strata comprised of Douglas fir, western red cedar, hemlock, big leaf maple, and red alder." Wetland Z itself demonstrates a red alder overstory interspersed with willow, cottonwood and Oregon ash, with the surrounding non-forested fringe dominated by reed canarygrass. Mr. Burnstad, the Appellant's wetland consultant, estimated that the central forested component of Wetland Z covered approximately 40 to 45% of the total wetland area. Although the thick alder stand within Wetland Z appears to be fairly young growth consisting mainly of small diameter trees, it was agreed by all observers that the height of the trees generally exceed 20 feet. Mr. Burnstad also agreed with LUSD wetland specialist, Jon Hansen, that application of the "Palustrine, forested" classification under the Cowardin system is warranted when the percentage of forested cover exceeds 30%.
9. The Watershed Dynamics' wetland report additionally provided an assessment of the functions and values of the wetlands on the Lindstrom site. Pursuant to this assessment, the report assigned to the Appellant's wetlands an overall low function and value rating. This low rating was based primarily on findings that the wetlands demonstrate a low rate of runoff detention, are hydrologically isolated from other upslope wetland areas, and exhibit low plant diversity and vegetation complexity. However, the report also notes that the low runoff retention rate and lack of diversity and complexity are principally the result of "past forest harvest and land use actions."
10. Besides the question of the proper classification to be assigned to Wetland Z, the Appellant has challenged whether the water course across Lot 3 should be considered a stream under the County's Sensitive Areas Ordinance. The water course begins on Lot No. 3 at its northern end where three offsite drain lines feed into a culvert under an existing driveway and empty into a channel. Two of the drain lines have been identified as conducting roof runoff from offsite houses while the third appears to provide drainage to an offsite wetland.
11. The gradient along the northern two-thirds of Lot 3 appears to be very gentle, and the flows which enter from the drain lines sometimes follow a channel and at other times appear to disperse into a sheet flow. At about the midpoint of the Lot, however, there is clear evidence that a flow channel has been bulldozed and natural drainage patterns altered. A slot has been cut into a natural ridge which, prior to excavation, would have directed flows east toward Wetland Z on Lot 4. As artificially realigned, the channel now travels toward the southeast corner of Lot 3, where flows enter a 12-inch culvert and exit offsite. The offsite channel continues southeast to the roadside ditch system along 244th Avenue Southeast.
12. The stream mapping contained within both the Watershed Dynamics' report and County sources shows the drainage leaving the Lindstrom site within the 12-inch culvert joining flows along 244th Avenue Southeast and entering Tributary 0321 leading to the Cedar River. The King County Sensitive Areas map folio represents this stream as Class 2 with salmonids beginning at the point downstream where it crosses Southeast 192nd Street just west of 244th Avenue Southeast, some 2,000 feet south of the Lindstrom property. A 1992 Surface Water Management Division reconnaissance of Tributary 0321 reports that the "stream is in pretty good shape up to the Southeast 192nd Street crossing." Upstream of this crossing the creek passes through a

livestock pond in which wetland vegetation has been obliterated and heavy siltation occurs. North of the pond is the roadside ditch system. In contrast, the SWM report indicates that about one mile downstream from the Lindstrom property, where Tributary 0321 joins 0323 and 0323A, the system provides "significant habitat for salmonids."

13. There is general agreement that flows within the channel across the Lindstrom property are seasonal in nature, beginning usually in the late Fall and ending sometime in the Spring. There is no evidence of a pre-existing natural channel across the Lindstrom parcel, and the topographical information suggests that its prior existence would have been unlikely. That a channel currently exists which demonstrates the effects of water flow cannot be seriously disputed; this feature is particularly clear in the steeper gradient area where the pre-existing ridge has been excavated and south to the property line. In this portion of the channel larger rocks have been exposed by the passage of water, and sands and gravels have been graded and sorted. Both staff and Applicant wetland experts agreed that the drainage course across the Lindstrom property possesses no significant stream habitat features and does little more than facilitate the passage of surface water flows. There is no evidence of salmonid use in this section of the water course.

CONCLUSIONS:

1. Hearing Examiner jurisdiction to consider issues raised by this short plat appeal is limited to questions concerning classification of wetlands and streams under the Sensitive Areas Ordinance. The appeal raises important issues concerning appropriate classifications under the ordinance methodology. While the literal terms of the SAO provide some guidance to resolution of these issues, ultimately they must be related to the overall purpose of the County's environmental protection scheme.
2. Turning first to KCC 21A.06.1240, the basic functional definition of a stream is an area "where surface waters produce a defined channel or bed". This definition is met by significant portions of the channel which crosses Lot 3. While there are areas of sheet flow in the northern part of the lot, at the northern extreme and throughout the southern half there is a defined channel showing clear evidence of the passage of water.
3. There is also evidence, however, that this channel is an artificial feature of the lot, in which case under KCC 21A.06.1240 it may qualify for exclusion from the stream definition. No evidence has been introduced to suggest that a stream channel existed on the lot prior to excavation of the drainage course, and the topography of the site with its gentle gradient and cross-gradient ridges suggest that this was not the case. Mr. Hansen's assertion that the stream was "relocated" is untenable unless there is some evidence of an original stream location. The conclusion that a natural stream channel never existed previously is fortified by the fact that the current hydrology for the drainage course appears to consist largely of constructed offsite sources artificially piped to the northern plat boundary.
4. Our conclusion that the feature on Lot 3 is not a protected stream is also supported by the fact that it performs minimal sensitive areas functions as defined by KCC 21A.06.1065 and 21A.06.1235. The fundamental purpose of the Sensitive Areas Ordinance is to protect sensitive environmental features which perform important ecological functions. When those functions are absent, the rationale for imposing regulatory controls disappears, and primary emphasis must be given to the property owner's right to use his land without undue restriction.
5. KCC 21A.06.1415.B.4 provides that the Class 2 wetland designation includes those features which "are forested wetlands equal to or less than one acre but larger than 2,500 square feet." KCC 21A.06.1400 defines a forested wetland as one "which is characterized by woody vegetation at least 20 feet tall."
6. As it is uncontested that the red alders which predominate within the forested component of Wetland Z are greater than 20 feet in height, the classification issue resolves into determining at what point a wetland is "characterized by woody vegetation." The Appellant urges an interpretation that a wetland is only characterized by forest when the forested component predominates, i.e., comprises more than 50% of the wetland area.

There are a number of problems with the Appellant's position. First, the ordinance does not use the words "predominant" or "dominated by" within the regulatory standard. Certainly, if such a simple, mathematically precise standard were intended, the ordinance would have said so.

7. Second, a rigidly numerical percentage approach would create some odd consequences when

applied to the range of parcels subject to the regulatory requirement. According to the Appellant's interpretation, a 2,500 square foot wetland with a 1,300 square foot forested component would merit a Class 2 level of protection, while a 40,000 square foot wetland with a 19,000 square foot forested component would not. It would appear that by using the word "characterized" the ordinance seeks to preserve some ability to assess in the application of the classification system the actual value of the forested element of the wetland.

8. Further, the original 1990 Sensitive Areas Ordinance as enacted under Ordinance 9614 specifically predicated its wetland classification nomenclature on the 1979 Cowardin system. While the more recent amendments to the SAO have deleted the references to the Cowardin literature, there is no evidence that the Cowardin system has been replaced by a different methodology. Since the Cowardin system uses the forested descriptor when 30% of a wetland's total area is in forested vegetation, the staff's classification of Wetland Z as a Class 2 wetland based on a 40 to 45% forested component seems clearly warranted by the accepted wetlands literature. This classification seems particularly appropriate where the forested component exceeds the 2,500 square foot regulatory minimum and is located in a habitat area which is forested generally. All of these factors support a conclusion that Wetland Z is characterized by its forested wetland component and, if protected from logging and human disturbance, will over time develop into a vital forested wetland habitat. Accordingly, the goals of the Sensitive Areas Ordinance also support the staff's conclusion that Wetland Z exhibits values meriting a Class 2 forested wetland designation and its attendant significant level of environmental protection.

DECISION:

The appeal is GRANTED in part and DENIED in part. The appeal is granted as to the Appellant's claim that the drainage course across Lot 3 is not a stream within the meaning of the King County Sensitive Areas Ordinance and is denied in all other respects; provided that, exclusion of the drainage course from a sensitive areas stream classification also necessitates deletion from the short plat preliminary approval of all other sensitive areas requirements which were dependent upon the stream classification.

ORDERED this 5th day of September, 1996.

Stafford L. Smith, Deputy
King County Hearing Examiner

TRANSMITTED this 5th day of September, 1996, to the following parties and interested persons:

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Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding short plat appeals. The Examiner's decision shall be final and conclusive unless within twenty (20) days from the date of the decision an aggrieved party or person applies for a writ of certiorari from the Superior Court in and for the County of King, State of Washington, for the purpose of review of the decision.

MINUTES OF THE AUGUST 22, 1996, PUBLIC HEARING ON FILE NO. L95S0022/L9600302 - RICHARD LINDSTROM SHORT PLAT APPEAL

Stafford L. Smith was the Hearing Examiner in this matter. Participating at the hearing were Jon Hansen, Anne Knapp and Curt Foster, representing the County; and Patrick Anderson, Richard Lindstrom, and Larry Burnstad.

The following exhibits were offered and entered into the hearing record:

Exhibit No. 1	Staff report
Exhibit No. 2a	Hearing to Schedule memo to Examiner dated July 17, 1996
2b	Certificate of Service from Patrick B. Anderson received August 15, 1996
2c	Prehearing Disclosure of Information from Patrick Anderson, received August 15, 1996
Exhibit No. 3	Notice of Hearing dated July 30, 1996
Exhibit No. 4	Notices of Appeal:
a	Lindstrom appeal notice received June 10, 1996
b	Stillmaker appeal notice and statement, received June 11, 1996
c	Lindstrom appeal notice and statement (2nd), received July 15, 1996
Exhibit No. 5	Appeal fee receipt (Lindstrom appeal) dated June 10, 1996
Exhibit No. 6	Statements of Appeal:
a	Stillmaker statement of appeal, received June 11, 1996
b	Lindstrom statement of appeal, received June 25, 1996
c	Lindstrom statement of appeal and notice (2nd) received July 15, 1996
Exhibit No. 7	Short plat file
Exhibit No. 8	Area wetland map
Exhibit No. 9	Wetlands Evaluation and Delineation Report prepared by Watershed Dynamics, Inc
Exhibit No. 10	Photograph looking west from 244th into tree stand (Wetland "Z")
Exhibit No. 11	Photograph looking NE into Wetland "Z" from southern boundary of Lot No. 4
Exhibit No. 12	Photographs looking north/northeast into Lot 4 and Wetland "Z" from southern boundary and looking north into Lot 4
Exhibit No. 13	Photographs (2) looking southwesterly into Wetland "Z" on Lot 4 and

	looking at east edge of Wetland "Z" along 244th Avenue SE
Exhibit No. 14	Photograph looking upslope at cut through ridge to allow drainage to flow in current ditch
Exhibit No. 15	Photograph looking downslope at cut through ridge to create drainage ditch
Exhibit No. 16	Photograph looking upslope at bottom of drainage ditch
Exhibit No. 17	Photograph looking upslope along existing interior road in Lot No. 3
Exhibit No. 18	Photographs (2) looking downslope in area of interior road located near the north property boundary and looking upslope in same area as above
Exhibit No. 19	Photographs (2) looking southeasterly into area where 3 corrugated plastic pipes discharge onto Lindstrom property at upper end of drainage swale and view of outlet of two of the three pipes
Exhibit No. 20	Photographs (3) looking upslope from north boundary of Lot 2, looking downslope into Lot 3, and area where 3 drain pipes meet and discharge into Lot 2
Exhibit No. 21	Photographs (2) of one of the houses draining to Lot 3 and looking southwest into Wetland "Z" from 244th Avenue SE
Exhibit No. 22	Excerpt from King County SWM culvert survey completed in June 1992

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